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Court of Appeals
Division III
State of Washington

29819-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARIO JAY UPHAM,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the sentence of the Appellant.

III. ISSUE

Where the prior juvenile offense is listed as "VUCSA – POSS. MARIJ" and context establishes the parties' agreement that this offense is a felony, is there any error in considering this offense to be a felony in calculating the offender score?

IV. STATEMENT OF THE CASE

The Defendant Mario Jay Upham was charged with possession with intent to deliver marijuana, use of drug paraphernalia, and driving while license suspended in the third degree. CP 1-3. He pled guilty to an amended charge of possessing over 40 grams of marijuana. CP 4-14.

The Statement on Plea of Guilty sets forth the Defendant's offender score of 6 and standard range of 12+ - 24 months. CP 7. The statement reads

in relevant part:

> 6. (c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete.

CP 7.

The parties' understanding of the Defendant's criminal history is attached to the Statement of Defendant on Plea of Guilty. CP 14. It includes four adult felonies and four juvenile felonies, one of which is an 11/14/96 conviction for "VUCSA – Poss Marij." CP 14.

On the record, the court reviewed the criminal history, offender score, and sentencing range with the Defendant:

> THE COURT: The maximum sentence in this case is 5 years in prison or a $10,000 fine or both. The community custody range is up to 12 months. The standard range is 12 months plus one day to 24 months based on an offender score of 6. That term would be spent in prison.
>
> Do you understand the maximum penalty, the standard range, and the community custody range?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Attached on the last page of this plea statement is a copy of your criminal history. Have you looked at that and do you believe that is accurate?
>
> THE DEFENDANT: Yeah. We made one correction on it.
>
> THE COURT: Okay, I see that.

THE DEFENDANT: So it is pretty accurate, yeah.

THE COURT: Okay, I see that. That was marijuana; correct?

THE DEFENDANT: Yes.

THE COURT: Okay. Other than that, do you think this is an accurate list?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you understand that if it is discovered you have additional countable history that's not listed here, the standard range penalty on this charge may be greater and you cannot withdraw your guilty plea for that reason alone?

THE DEFENDANT: Yes.

RP 6-7. The judge repeated the sentencing range to be clear. RP 8, ll. 21-24.

At sentencing, the defense attorney reminded the court that the standard range was 12+ - 24 months. RP 14. Consistent with the plea hearing, the Defendant requested a DOSA. CP 9; RP 8, ll. 8-9; RP 14, ll. 11-13. Also consistent with the plea hearing and statement, the prosecutor recommended the low end of the standard range – or 12 months (CP 9; RP 8, ll. 4-7; RP 15, ll. 4-5). The court imposed an 18 month sentence. RP 17, ll. 24-25.

The Defendant appeals from his sentence.

V. ARGUMENT

THERE IS NO ERROR IN THE OFFENDER SCORE.

On appeal, the Defendant argues for the first time that his 1996 juvenile conviction for Possession of Marijuana was a misdemeanor and should not have contributed to his offender score.

The Defendant pled guilty to an offense under RCW 69.50.4013(1). CP 15. This is a drug offense with seriousness level I. RCW 9.94A.518. For an offender score of 3-5, the standard sentencing range is 6+ - 18 months; with an offender score of 6-9, the standard sentencing range is 12+ - 24 months. RCW 9.94A.517.

Based on the criminal history set forth in the plea statement and judgment and sentence (CP 14, 17), the offender score of six was arrived at by scoring each adult conviction as one point and each juvenile *felony* conviction as half a point. RCW 9.94A.030(53); RCW 9.94A.525(7). *See also* Appellant's Brief at 4.

Whether marijuana possession is treated as a felony or a misdemeanor depends on the amount possessed. RCW 69.50.4013; RCW 69.50.4014. The Defendant is arguing for the first time on appeal that his prior juvenile

offense was a misdemeanor and, therefore, not scorable. In other words, the Defendant is arguing his offender score was 5 ½, which would mean that his standard range was 6+ - 18 months. RCW 9.94A.517.

While it is not clear from the words "VUCSA – POSS MARIJ" whether this was a felony or misdemeanor conviction, it is apparent from the context that the parties had a shared understanding that the offense was a felony. First, in this case of a current felony drug conviction, only a prior *felony* offense would have relevance to an offender score so as to be included in this list. RCW 9.94A.525; *see also State v. Wiley,* 124 Wn.2d 679, 683, 800 P.2d 983 (1994) ("With one exception [traffic cases], misdemeanors do not count"). Second, the prosecutor originally listed this offense as a possession of methamphetamine, which is a felony. CP 14; Appellant's Brief at 4; RCW 69.50.4013. Although the Defendant disagreed with the type of drug possessed, he did not alter the score. CP 6-14; RP 6 (Defendant stating that the criminal history was accurate). There is no indication that the revision affected the offender score. The only way the score could be a six and the range to be 12+ - 24 months would be for the parties to understand that this juvenile offense was a felony. Therefore, it is apparent that the parties understood that this was a felony offense. Third, there is no objection

to the score or range at either the plea or sentencing hearings. In fact, the Defendant's counsel advised the court at the sentencing hearing of the sentencing range. RP 14.

The obvious conclusion from this context is that the parties understood and agreed that the juvenile VUCSA conviction was a felony conviction.

There is no error.

However, if the Court finds that there is insufficient evidence on this record for the offender score, because there was no timely objection, the proper remedy would be a re-sentencing hearing at which point the state would be permitted to present new evidence on remand. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). At that point, the State would provide the judgment and sentence in which it is apparent that this juvenile conviction was for a felony offense. That being the case (and based on the Statement of Additional Grounds), it is apparent that the Defendant's goal is not a review of the patently correct offender score, but a second shot at a request for a DOSA.

This Court should find that the record sufficiently supports the offender score, such that there is no error.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: Oct. 21, 2011.

Respectfully submitted:

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